STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

In re CONTEMPT OF KATHY H. MURPHY, Contemnor-Appellants,	Supreme Court No. 165666 Court of Appeals No. 360560
PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellee, v. KATHY H. MURPHY, Defendant-Appellant.	Wayne County Circuit Court Case No. 19-005667-01-AR 36th District Court Case No. 19-00039

36th DISTRICT COURT'S BRIEF ON APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Does the Fifth Amendment protection against double jeopardy attach to summary contempt proceedings under Michigan law?

The Circuit Court would answer: No.
The Court of Appeals would answer: No.
The 36th District Court's answer: No.

II. Does double jeopardy bar a remand for nonsummary contempt proceedings if Defendant-Appellant's summary contempt conviction is reversed?

The Circuit Court would answer: No.
The Court of Appeals would answer: No.
The 36th District Court's answer: No.

I. INTRODUCTION

This amicus brief is submitted pursuant to this Court's January 21, 2025 request seeking the 36th District Court's analysis of whether the Court of Appeals correctly held that double jeopardy does not attach to summary contempt proceedings. For the reasons below, the District Court agrees with the analysis of the Court of Appeals.

First, the purpose of the protection afforded under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article 1, § 15 of the Michigan Constitution does not extend to summary contempt proceedings, given the nature of the proceeding itself. During a summary contempt hearing, the alleged contemnor is not subjected to the embarrassment, expense, and ordeal contemplated by the guarantees against jeopardy, nor does the proceeding compel the contemnor to live in a continuing state of anxiety and insecurity given the swift imposition of a summary contempt conviction. Second, the Court should not attach double jeopardy to summary contempt proceedings because the effect would grant immunity from prosecution for a substantive criminal offense. The consequence of doing so would put courts and judges in the undesirable position of choosing between maintaining the decorum of the court and preserving the substantive criminal offense for prosecution. To avoid such a predicament, other jurisdictions have determined that the protection against double jeopardy does not extend to summary criminal contempt prosecutions. This Court should find the same. Lastly, because nonsummary contempt proceedings are akin to a traditional criminal bench trial, reversal of Defendant-Appellant's summary contempt conviction does not mean that jeopardy would bar a remand for nonsummary contempt proceedings. For these reasons, the Court should affirm the Court of Appeals' March 7, 2024 opinion.

II. STATEMENT OF FACTS

The 36th District Court[1] does not take a position as it relates to the facts and counter-facts presented by the parties. The purpose of this Brief is to address the issue of double jeopardy as it relates to summary contempt hearings, as requested by this Court.

III. LEGAL ARGUMENT

A. THE PURPOSE OF THE GUARANTEE AGAINST DOUBLE JEOPARDY DOES NOT EXTEND TO SUMMARY CONTEMPT CONVICTIONS.

The Court should affirm the Court of Appeals because Defendant-Appellant did not suffer the repetitive and continuous uncertainty, embarrassment, and general harassment contemplated by the Constitutional guarantee against double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no "person be subject for the same offence to be twice put in jeopardy of life or limb ...." US Const, Am V. The Michigan Constitution contains a similar provision: "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. This Court has construed these provisions consistently in the past. *People v Miller*, 498 Mich 13, 16-17 (2015).

The purpose of the protection against double jeopardy is to protect a person from having to endure the cost, uncertainty, embarrassment, and general harassment of multiple criminal trials on the same charge for the same conduct. *Blueford v Arkansas*, 566 US 599, 605 (2012). It "assures an individual that…he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney v United States*, 431 US 651, 661 (1977); *Smalis v Pennsylvania*, 476 US 140, 143 n. 4

[1] The 36th District Court is not required to file a motion for leave to file an amicus curiae brief under MCR 7.312(H)(2).

(1986); *Ohio v Johnson*, 467 US 493, 498 (1984). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v United States*, 355 US 184, 187-188 (1957). Further, "an accused shall not have to marshal the resources and energies necessary to his defense more than once for the same alleged criminal acts." *United States v Mirra*, 220 F Supp 361, 366 (SD NY 1963).

In contrast to charges to which double jeopardy attaches, a person held in summary contempt and then subsequently indicted does not suffer the harassment of successive trials because the swift imposition of a summary contempt conviction is not preceded by an adversary-type proceeding. *Id.; see also*, *United States v Rollerson*, 449 F2d 1000, 1004 (CA DC, 1971). As the Court of Appeals in this case correctly articulated, "[a] summary proceeding is meant to address and punish contemptuous behavior immediately… No charges are filed and no evidence is taken – the judge is, in a real sense, the victim, prosecutor, judge, and jury." *In re Contempt of Murphy*, 345 Mich App 500, 509 (2023). The alleged contemnor cannot resolve the issues with the full rights afforded to an accused in a criminal proceeding. *Rollerson*, 449 F2d 1004. Similarly, the prosecutor is not obliged to present evidence or interfere with the proceedings. *Id.* Simply stated, the prosecutor does not prosecute, and the defense does not defend. *Id.* Therefore, the first trial-type "harassment" to which the contemnor is subjected to is the criminal trial arising out of the contumacious conduct – not the summary contempt hearing. *Id.*

Applying these principles to this case, Defendant-Appellant did not suffer the uncertainty, embarrassment, and general harassment contemplated by the guarantee against double jeopardy.

The protection is against *repetitive* and *continuous* anxiety and insecurity, endured when defending criminal trials from beginning to end. *Green v United States*, 355 US at 187-188. Whereas a summary contempt proceeding, at most, results in an isolated period of alleged embarrassment arising out of a "short duration of the summary trial" as Defendant-Appellant admits.

Defendant-Appellant's allegations to the contrary change nothing. She now attempts to argue that she suffered anxiety, insecurity, and embarrassment during the summary contempt hearing.[2] However, there is no dispute that Defendant-Appellant was on her phone during that proceeding. Defendant-Appellant's allegations about her alleged damages cannot be made retroactively. Doing so would require the Court to engage in hindsight analysis, which is not permitted. *People v Solloway*, 316 Mich App 174 (2016) (claim for ineffective assistance of counsel, a mixed question of fact and constitutional law – as is here – must be evaluated at the time of the alleged error without the benefit of hindsight). Under these facts, Defendant-Appellant did not suffer such repetitive and continuous embarrassment, anxiety, or insecurity because of the nature of the swift imposition of a summary contempt conviction. Therefore, double jeopardy does not extend here.

B. IN A BROADER CONTEXT, ATTACHING DOUBLE JEOPARDY TO SUMMARY CONTEMPT PROCEEDINGS WOULD EFFECTIVELY BAR THE SUBSEQUENT PROSECUTION OF THE CONTUMACIOUS ACT AS A SUBSTANTIVE CRIME.

The constitutional prohibition against double jeopardy bars retrial, or a second prosecution, after acquittal or conviction, and protects against multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299 (2007). However, the guarantee against double jeopardy does not apply to summary contempt prosecutions because the crime of contempt and the underlying substantive offense protect distinct interests. In other words, although only a single act has been

[2] Defendant-Appellant admits that she did not incur any expenses in preparing for trial.

committed, it constitutes two separate and unrelated offenses. *O'Malley v United States*, 128 F2d 676, 684 (8th Cir 1942), rev'd on other grounds. One offense is against the dignity and effectiveness on the court in its administration of the laws, and the other is against the public peace started by the state through criminal sanctions. *Id.*

The United States Supreme Court further articulated this distinction in *Abbate v United States*, 359 US 187, 194-195 (1959)Mirra, holding that the double jeopardy clause does not bar a federal prosecution based upon the same act for which the defendant already has been prosecuted by a state, because the prosecutions are by separate sovereigns, each of which derives its power from a different source and each of which exercises its sovereignty when determining what conduct shall be an offense against its peace and dignity.

Attaching double jeopardy to summary contempt proceedings would effectively grant immunity from prosecution for a substantive criminal offense based on the same contumacious conduct. *Mirra*, 220 F Supp at 366 (explaining that "[t]o permit a defendant to escape the consequences of his contumacy via the Double Jeopardy route would be to countenance a state of affairs where judges could become ineffectual in restoring judicial decorum for fear that a contempt conviction would raise a constitutional bar to a subsequent prosecution of the same act."). In *Mirra*, 220 F Supp 361, the summary criminal contempt conviction for throwing a chair at a federal prosecutor did not bar the subsequent prosecution for assault on a federal officer engaged in performance of official duties, even though both offenses were based upon the same act.

Courts in other jurisdictions agree. In *Rollerson*, 449 F2d 1000, the summary criminal contempt conviction for hitting a federal prosecutor with an ice-filled plastic water pitcher did not bar the subsequent prosecution for assault with a dangerous weapon and assault on a federal officer

engaged in performance of official duties, even though all three offenses were based upon the same act. See also *People v Heard*, 566 NE2d 896, 898 (Ill App Ct 1991) (summary criminal contempt conviction regarding a defendant representing himself to be his brother in criminal case, did not preclude the subsequent prosecution for obstructing justice, even though both offenses were based upon the same act). *Maples v State*, 565 SW2d 202, 204 (Tenn 1978) (summary criminal contempt conviction for giving false testimony in a divorce proceeding did not bar the subsequent prosecution for perjury, even though both offenses were based upon the same act). *State v Bowling*, 520 NE2d 1387, 1389-90 (Ohio Ct App 1987) (concluding that the contempt conviction for uttering profanity in courtroom, striking prosecutor, and biting court bailiff did not preclude subsequent prosecution for assault and felonious assault, based upon the same incident, because neither assault constituted the "same offence" as contempt for double jeopardy purposes). *State v Warren*, 451 A2d 197, 200-02 (NJ Super Ct Law Div 1982) (summary criminal contempt conviction for refusing to testify in a murder trial, after being directed to do so by the trial judge, did not bar the subsequent prosecution for hindering prosecution of another, even though both offenses were based upon the same act). *People v Totten*, 514 NE2d 959, 962-63 (Ill 1987) ("aggravated battery and direct criminal contempt do not constitute the same offense for double jeopardy purposes.").

This Court should rule consistent with other jurisdictions and conclude that the protection against double jeopardy does not extend to summary contempt proceedings because the crime of contempt and the underlying substantive offense are not the same for purposes of double jeopardy.

C. REVERSAL OF DEFENDANT-APPELLANT'S SUMMARY CONTEMPT CONVICTION DOES NOT MEAN THAT DOUBLE JEOPARDY WOULD BAR A REMAND FOR NONSUMMARY CONTEMPT PROCEEDINGS.

As the Court of Appeals correctly concluded, nonsummary contempt proceedings are akin to a traditional criminal bench trial. *In re Contempt of Murphy*, 345 Mich App at 510. In a

nonsummary proceeding – unlike summary contempt proceedings – immediate correction and punishment are not required. *United States v Dixon*, 509 US 688, 696 (1993).[3] Rather, more traditional due process protections can be observed including the notice of charges, assistance of counsel, and a public hearing. *Id.* When a criminal conviction is reversed on appeal, double jeopardy usually does not bar re-prosecution. *Bravo-Fernandez v United States*, 580 US 5, 18 (2016). The same is true for nonsummary contempt proceedings.

The Court of Appeals was correct: "the mere fact that Murphy was criminally convicted, and that conviction was reversed on appeal, does not, by itself, imply that double jeopardy must bar a nonsummary proceeding on remand." *In re Contempt of Murphy*, 345 Mich App at 509. It is well established that trial errors can result in a criminal conviction being reversed by an appellate court, with the remedy being a remand for a new trial. *People v Smith*, 498 Mich 466, 487-488 (2015); *People v Ramsey*, 503 Mich 941 (2019) (remanding to this Court to determine whether the decision to grant a new trial for a verdict against the great weight of the evidence was within the range of principled outcomes).

When a conviction is overturned on appeal, "the [g]eneral rule is that the [Double Jeopardy] Clause does not bar reprosecution." *Bravo-Fernandez*, 580 US at 18. The purpose behind the rule "reflects the reality that the criminal proceedings against the accused have not run their full course." *Id.* By permitting a new trial, the rule serves both the public and the accused's interests – the fair administration of justice. *Id.* "It would be a high price indeed for society to pay…were every accused were granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.*

[3] The Court in *Dixon* held that double jeopardy applies to nonsummary proceedings. However, both Justice Scalia (writing for the majority) and Justice White (writing in dissent) agreed that this holding did not imply that double jeopardy extended to summary proceedings.

A deviation from the rule occurs solely when the conviction is reversed for a lack of sufficient evidence. Under that circumstance, jeopardy attaches to the conviction reversed on appeal. *Burks v US*, 437 US 1 (1978) (double jeopardy precluded a second trial in a state court where a conviction in the first trial was reversed by the reviewing court solely for lack of sufficient evidence to sustain the verdict). However, as the Court of Appeals correctly articulated, that is not the case here – "there was not a lack of sufficient evidence supporting Murphy's contempt conviction." *In re Contempt of Murphy*, 345 Mich App at 507. The Court should apply the general rule and hold that double jeopardy does not bar a remand for nonsummary contempt proceedings.

IV. CONCLUSION AND RELIEF REQUESTED

For these reasons, the 36th District Court respectfully requests that this Court deny Defendant-Appellants' application for leave to appeal from the Court of Appeals' March 7, 2024 opinion, holding that double jeopardy does not bar this matter from being taken up in a nonsummary proceeding on remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the work limitation of MCR 7.212 (B)(1). The brief contains 2,378 words, excluding the parts of the brief exempted by MCR 7.212(B)(12).

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